

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33220

MICHAEL MAX LANE,	)	2008 Unpublished Opinion No. 480
	)	
Petitioner-Appellant,	)	Filed: May 29, 2008
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Respondent.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Order denying petition for post-conviction relief, affirmed.

Nevin, Benjamin, McKay & Bartlett, Boise, for appellant. Robyn A. Fyffe argued.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent. Jennifer E. Birken argued.

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GUTIERREZ, Chief Judge

Michael Max Lane appeals from the district court's denial of his petition for post-conviction relief. We affirm.

I.

BACKGROUND

Michael Max Lane pled guilty to one count of burglary, I.C. § 18-1401, and one count of grand theft, I.C. §§ 18-2403(4), -2407(1). In exchange for these guilty pleas, the state agreed to dismiss an additional allegation that he was a persistent violator. The district court sentenced Lane to serve ten years, with nine years determinate, for burglary, and fourteen years, with eight years determinate, for grand theft. The sentences were ordered to be served consecutively. This Court affirmed the sentences on direct appeal in an unpublished decision. *State v. Lane*, 2004 Docket No. 29442 (Ct. App., January 2, 2004).

Lane subsequently filed a *pro se* petition for post-conviction relief, alleging ineffective assistance of trial counsel and improper imposition of sentences; he also requested the appointment of counsel to assist him. The district court denied Lane's motion for counsel, finding that there were no "special circumstances necessitating the appointment of counsel in this case." Lane later filed a second motion for appointment of counsel, however, the district court never ruled on Lane's second motion for counsel. Instead, the district court issued a notice of intent to dismiss Lane's petition. After considering Lane's additional affidavits, the district court denied Lane's claim that the sentence was improperly imposed. The district court allowed Lane to proceed with his claims of ineffective assistance of counsel.

Lane then filed a motion to withdraw his guilty pleas in the underlying criminal case. Lane filed the motion with the district court under the case number assigned to his post-conviction petition. The district court denied the motion to withdraw the guilty pleas, finding the motion was inappropriate due to the lack of a final determination on Lane's post-conviction petition. Lane filed a notice of appeal from the district court's denial and requested appointment of counsel on appeal. The district court denied counsel, and the appeal was soon dismissed because Lane failed to pay the required fee for preparation of the transcript. Lane thereafter moved for an evidentiary hearing on his ineffective assistance of counsel claims, and again sought appointment of counsel. This time, the district court granted appointment of counsel, citing to I.C. § 19-852(b)(3) for the proposition that counsel should be appointed if the claim is not frivolous.

Lane, through appointed counsel, filed an amended petition for post-conviction relief, raising claims of ineffective assistance of counsel. Before the evidentiary hearing could be held, the Idaho Department of Corrections transferred Lane to Minnesota. Lane and the state agreed to submit the case on the evidence already before the district court. The district court denied Lane's petition for post-conviction relief, finding that he failed to show that his trial counsel's performance was deficient, and he failed to provide evidence to support his otherwise conclusory allegations. This appeal followed.

## **II.**

### **DISCUSSION**

Lane raises two issues on appeal. First, he asserts that the district court erred by not ruling on his motion for appointment of counsel prior to dismissing his motion to withdraw his

guilty pleas. Lane's second contention is that the district court erred by denying his petition for post-conviction relief based on the ineffective assistance of trial counsel. We will address each in turn.

**A. Failure to Appoint Counsel Prior to Dismissing Lane's Motion to Withdraw his Guilty Pleas**

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983) *superseded by rule as stated in State v. Blume*, 113 Idaho 224, 743 P.2d 92 (Ct. App. 1987); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969) *abrogation on other grounds recognized by State v. Gardner*, 126 Idaho 428, 885 P.2d 1144 (Ct. App. 1994); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). If a post-conviction applicant is unable to pay for the expenses of representation, the trial court may appoint counsel to represent the applicant in preparing the application, in the trial court and on appeal. I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). When a district court is presented with a request for appointed counsel, the court must address this request before ruling on the substantive issues in the case. *Charboneau*, 140 Idaho at 792, 102 P.3d at 1111; *Fox v. State*, 129 Idaho 881, 885, 934 P.2d 947, 951 (Ct. App. 1997) *superseded by statute as stated in Smith v. Idaho*, 392 F.3d 350 (9th Cir. 2004). The district court abuses its discretion where it fails to determine whether an applicant for post-conviction relief is entitled to court-appointed counsel before denying the application on the merits. *See Charboneau*, 140 Idaho at 793, 102 P.3d at 1112.

Lane's first motion for counsel accompanied his petition for post-conviction relief. The district court denied this motion because there were no "special circumstances" which would require appointment of counsel, citing to *Freeman v. State*, 87 Idaho 170, 392 P.2d 542 (1964). This however was not the proper standard. *Freeman* was a case about appointing counsel in *habeas corpus* proceedings. While both *habeas corpus* and post-conviction cases are civil in nature, cases brought pursuant to the Uniform Post-Conviction Procedures Act (UPCPA) are controlled by a different set of rules than *habeas corpus* cases. The special circumstances consideration applicable to proceedings in *habeas corpus* thus had no bearing on Lane's motion. The district court erred by not applying the proper standard when denying Lane's first motion for appointment of counsel. We also conclude that the district court erred by not considering Lane's

second motion. The proper inquiry before us then is whether such errors were prejudicial. *Swader v. State*, 143 Idaho 651, 653, 152 P.3d 12, 14 (2007).

Here, the district court granted Lane's third motion, finding that his ineffective assistance of counsel claims were not frivolous. In doing so, however, the district court again applied the wrong standard, citing to I.C. § 19-852(b)(3), which the Idaho Supreme Court had already declared inapplicable to claims under the UPCA. *Quinlan v. Idaho Comm'n for Pardons & Parole*, 138 Idaho 726, 730, 69 P.3d 146, 150 (2003). In the order granting counsel, the district court placed no limitations on the issues that could be raised in an amended petition for post-conviction relief, despite Lane's assertions to the contrary on appeal. In his amended petition, Lane asserted that counsel was ineffective for failing to investigate Lane's mental health issues, which was a basis for Lane's motion to withdraw his guilty pleas. Although the issue raised in the motion to withdraw the guilty pleas, that the pleas were not constitutionally valid, was not separately set forth in the amended petition, the issue was incorporated in the amended petition within the ineffective assistance of counsel claims. The claim regarding the imposition of sentences from his original petition was also reformulated into an ineffective assistance of counsel claim in the amended petition. Some of the claims raised by counsel were labeled as *pro se* claims, indicating that they were specifically requested by Lane. Lane's *pro se* petition, motions and affidavits were attached to the amended petition, including all of his original claims.

While the district court clearly erred by denying Lane's first motion for appointment of counsel on improper grounds, and by not considering Lane's second motion at all, those errors were eventually cured. Once counsel was appointed to assist Lane, the court accepted an amended petition for post-conviction relief which was not limited as to the claims that could be brought, including any claims previously denied by the court. The fact that only certain claims were raised was not the result of improper restrictions by the district court. Accordingly, the district court's failure to consider Lane's motion for appointment of counsel prior to dismissing his motion to withdraw the guilty pleas was not prejudicial. *See Swader*, 143 Idaho at 653, 152 P.3d at 14.

#### **B. Ineffective Assistance of Counsel**

Lane asserts that the district court erred by denying his petition for post-conviction relief because he has affirmatively shown that his trial counsel was ineffective. When appellate review of a district court's denial of post-conviction relief follows an evidentiary hearing, rather than a

summary dismissal, the evidence must be viewed most favorably to the trial court's findings. *McKeeth v. State*, 140 Idaho 847, 849, 103 P.3d 460, 462 (2004); *State v. Mathews*, 133 Idaho 300, 304, 986 P.2d 323, 327 (1999). In such a case, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. *Larkin v. State*, 115 Idaho 72, 764 P.2d 439 (Ct. App. 1988). We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

As with a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell*, 118 Idaho at 67, 794 P.2d at 656. An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations.

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray*, 121 Idaho at 924-25, 828 P.2d at 1329-30. Such a claim presents mixed questions of law and fact. *Id.* at 921-22, 828 P.2d at 1326-27. On appeal, when faced with mixed questions of fact and law, the appellate court will defer to the factual findings made by lower courts if those determinations are based upon substantial evidence, but will exercise free review of the application of the relevant law to those facts. *Mitchell v. State*, 132 Idaho 274, 277, 971 P.2d 727, 730 (1998). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient, and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174,

1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Id.* at 761, 760 P.2d at 1177. This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994). Furthermore, the constitutional requirement for effective assistance of counsel is not the key to the prison for a defendant who can dredge up a long series of examples of how the case might have been tried better. *Ivey v. State*, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992).

Lane first asserts that he has shown that his attorney was ineffective for failing to fully advise him of the consequences of waiving his right to a jury trial by pleading guilty. As a result of this purported failure, Lane contends that his guilty pleas were not constitutionally valid. When it is asserted that a guilty plea was the product of ineffective assistance, to prove the prejudice prong the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Martinez v. State*, 143 Idaho 789, 795, 152 P.3d 1237, 1243 (Ct. App. 2007). While Lane asserts that he would have insisted on going to trial if the consequences of waiving his right to a jury trial had been explained to him, he fails to show how counsel's performance was deficient. He has not shown what information was needed in order to understand the magnitude of waiving his right to a jury trial, or how that information would have changed his plea decision. Indeed, the district court informed Lane that he was waiving his right to a jury trial, and that as a result, the state was relieved of its burden of proof beyond a reasonable doubt on each and every element of the offenses. Lane was also told that he was giving up the right to compel witnesses on his behalf, and that he gave up the right to confront accusers against him. The record does not support Lane's argument that his pleas were not constitutionally valid or that counsel's performance in relation thereto was deficient.

Lane also contends counsel was ineffective by advising him that his sentences would be more punitive if he proceeded to trial than if he pled guilty, thereby rendering the pleas involuntary. The district court found that Lane's assertion lacked credibility, a finding which is not clearly erroneous. Even if Lane was so advised by trial counsel, such advice does not constitute coercion nor does it eliminate the otherwise knowing, voluntary, and intelligent nature

of his guilty pleas. *See Davidson v. State*, 92 Idaho 104, 106, 437 P.2d 620, 622 (1968) (holding that attorney's advice that sentence may be lighter if the defendant pleads guilty does not constitute coercion).

Finally, Lane argues that his attorney rendered ineffective assistance by failing to adequately investigate his mental health issues and drug reactions in order to rebut the specific intent elements of each crime. In a criminal case, counsel has a duty to conduct an adequate investigation. *Dunlap v. State*, 141 Idaho 50, 59, 106 P.3d 376, 385 (2004). The course of the investigation will naturally be shaped by a variety of factors, many peculiar to the individual case. *Richman v. State*, 138 Idaho 190, 193, 59 P.3d 995, 998, (Ct. App. 2002). The reasonableness of counsel's decision may be determined or greatly influenced by the defendant's statements or behavior. *Id.* Determining whether an attorney's pretrial preparation falls below a level of reasonable performance constitutes a question of law, but is essentially premised upon the circumstances surrounding the attorney's investigation. *Gee v. State*, 117 Idaho 107, 110, 785 P.2d 671, 674 (Ct. App. 1990). It is not sufficient merely to allege that counsel may have discovered a weakness in the state's case. *Id.* at 111, 785 P.2d at 675. We will not second-guess trial counsel in the particularities of trial preparation. *Id.*

Lane contends that counsel was aware of Lane's mental health history and the circumstances of his current crimes prior to the entry of his guilty pleas, and therefore should have inquired further into Lane's mental health problems to determine if he possessed the requisite specific intent for the crimes charged. Lane points to counsel's statement prior to sentencing that Lane had "some long-standing mental health issues which might be pertinent with regards to ultimate disposition of his case" and to counsel's request for a pre-sentencing psychological evaluation as proof of counsel's basic knowledge of Lane's mental health condition. Lane asserts that he informed his trial attorney that he had been given incorrect medicine which caused him to stop taking all of his medications. He then began suffering from delusional thoughts due to his gender dysphoria, which led to the current criminal charges. However, Lane's attorney informed the court that Lane's mental issues did not provide him with a defense to the crimes charged, nor did they indicate that Lane was incompetent. This belief on counsel's part was undoubtedly influenced by Lane's statements, behavior, and interactions with his attorney. Lane has not shown that the decision falls below an objective standard of reasonableness. Counsel consulted with Lane to determine that he had long-standing mental

health issues, but counsel also apparently believed that Lane's issues did not rise to the level of a defense to the crime or prevent him from rationally understanding the proceedings. Lane has failed to show that his attorney's performance was deficient. The district court did not err in denying Lane's claims of ineffective assistance of counsel.

### **III. CONCLUSION**

Although the district court applied the incorrect legal standards when considering Lane's motions for appointment of counsel and failed to rule on Lane's second motion for appointment of counsel, Lane was not prejudiced by the error. Counsel was eventually appointed to assist Lane with his petition for post-conviction relief, and had the opportunity to raise any and all claims reasonably supported by the record. Furthermore, the district court did not err by denying Lane's post-conviction claims. Lane failed to show by a preponderance of the evidence that he received ineffective assistance of trial counsel. The order of the district court denying Lane's petition for post-conviction relief is affirmed.

Judge PERRY and Judge Pro Tem WALTERS **CONCUR.**